February 27, 2004

Country of Origin Labeling Program
Room 2092-S
AMS, USDA; STOP 0249
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250-0249

Re: [No. LS-03-04] RIN 0581-AC26 - Mandatory Country of Origin Labeling (COOL) of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts

Dear Sir or Madam:

The Florida Fruit and Vegetable Association (FFVA) submits these comments on the subject notice, which was published in the Federal Register on October 30, 2003, (68 Fed. Reg. 61944-61985). FFVA is a producer organization that represents growers, packers, and shippers of citrus, vegetables, tropical fruit, sugarcane and other agricultural commodities.

FFVA compliments the Department on the substantial progress it has made in moving away from the provisions in the voluntary guidelines. The proposed rule, with the further refinements suggested herein, will provide an effective consumer notification program with minimal added costs and regulation.

The guidelines published by the Department in October 2002 – just over four months after the law's passage – were highly prescriptive in nature, and potentially could be interpreted to create a significant record-keeping burden for businesses throughout the distribution chain from producers to retailers. For the produce industry, the October guidelines failed to recognize or take maximum advantage of existing statutory requirements such as the Perishable Agricultural Commodities Act (PACA), which regulates transactions between produce sellers and buyers, or the Tariff Act of 1930, which requires labeling of imported packaged products. USDA's cost estimates of the impact of the guidelines exacerbated the controversy by suggesting that the industry would be hit with a $2 billion price tag. A recent General Accounting Office (GAO) study questioned the assumptions used by the Department in its cost analysis, and further recommended that it collaborate with industry to identify existing programs as alternatives for accomplishing many of the law's requirements. FFVA has consistently recommended this approach to USDA. The record-keeping provisions in the guidelines, while based in the law, were permissive and not mandatory. The statute states: "The Secretary **may** require … a

verifiable record-keeping audit trail that will permit the Secretary to verify compliance …"(emphasis added). USDA was not mandated by law to require record keeping. Similarly, in the area of enforcement, the statute states: "If the Secretary determines that the retailer has willfully violated [the act], after providing notice and an opportunity for a hearing … the Secretary **may** fine the retailer an amount of not more than $10,000 for each violation" (emphasis added). The law does not mandate the maximum fine for each violation, as some opponents have argued. The Department clearly has broad discretion in creating an enforcement matrix that penalizes only the most egregious offenders who consistently and intentionally violate the law.

On April 7, 2003, FFVA submitted comments and generally suggested that USDA adopt a much more streamlined and user friendly approach than had been the case with the guidelines. FFVA believes that the proposed rule is a substantial improvement and adopts many of FFVA's suggestions. In the discussion portion of the proposed rule, the Department invites further comments on some of the remaining concerns, such as record keeping. By specifically inviting additional comments, it is assumed that the Department is willing to move further in, further lessening regulatory requirements and burdens on the industry, and allowing maximum implementation flexibility.

Before addressing the most significant issue – the proposed rule itself – FFVA would like to comment generally on the Department's direct and indirect cost estimates, which were published with the proposed rule on October 30, 2003. FFVA believes that when the Department arbitrarily concluded that this program would not be beneficial, it then failed to adequately net out the cost of complying with existing regulations such as the Tariff Act of 1930 and the Perishable Agricultural Commodity Act (PACA). It also didn't take into account extensive signage used now in many covered retail establishments. If such costs had been accurately accounted for in the analysis, FFVA believes the Department would have been compelled to publish a significantly smaller direct cost figure for COOL implementation in the fruit and vegetable industry.

Additionally, in the Federal Register of October 10, 2003 (68 FR 58894 and 68 FR 58974), FDA issued two interim final rules to implement sections 305 (Registration of Food Facilities) and 307 (Prior Notice of Imported Food) of the Bioterrorism Act. The registration interim final rule requires domestic and foreign facilities that manufacture/process, pack, or hold food for human or animal consumption in the United States to register with FDA by December 12, 2003. The prior notice interim final rule requires the submission to FDA of prior notice of food, including animal feed, imported or offered for import into the United States beginning on December 12, 2003. The FDA examined the economic implications of these interim rules as required by the Regulatory Flexibility Act (5 U.S.C. 601-612) and determined that they would have a significant economic impact on a substantial number of small entities. It is clear that many of the growers, suppliers and retailers of covered commodities under COOL will be required to maintain records under the FDA rules. It does not appear that the Department adequately accounted for and netted out the economic or regulatory cost of the FDA requirements in its economic analysis of the direct costs of the COOL program.

With regard to the proposed rule itself, FFVA offers the following specific comments:

1. In the draft rule, the Department has differentiated its regulatory approach among the products covered by the Act.

FFVA suggested in its comments on the guidelines that the Department provide separate sets of regulatory requirements under the law depending on the nature of the specific covered commodity. While the proposed rule does not provide for a separate and distinct rule for fruits and vegetables, it does establish, within the rule, separate and distinct provisions applicable to fruits and vegetables. FFVA believes that this is a satisfactory response.

2. The proposed rule should be amended to add greater flexibility to bin labeling at the point of sale.

The statute identifies a wide array of notification methods that can be used at the discretion of the retailer. These include, "label, stamp, mark, placard, or other clear and visible signs on the covered commodity or on the package, display, holding unit or bin containing the commodity at the point of final sale to the consumers." Congress wisely left it to the retailer to determine how best to assure that such information is provided. Thus, the retailer has maximum flexibility in fulfilling the law's requirements.

We suggested to the Department that the regulations be similarly flexible in the terminology used to denote origin. The guidelines mandated that terms such as "Grown in Country X" or "Produce of Country Y" be used. We advised that this was too prescriptive, and recommended that the Department accept the listing or marking of the individual country name, or recognized abbreviation (i.e., United States or USA) as being sufficient to meet the requirements of the statute. In the proposed rule, USDA has adequately adopted this approach in Section 60.300 (Markings (a) (b) and (e)).

FFVA had also suggested that the Department incorporate a common sense approach in evaluating the effectiveness of the notification system selected by a retailer. For example, if the retailer has a bin or display of fruit, and a significant amount of the fruit is individually labeled with the country of origin, then the Department should not require additional labeling of the fruit even if some are missing a label. The test of the sufficiency of the notification method should be whether the consumer could reasonably ascertain the country of origin of the produce at the point of sale. It is recognized that labels can fall off in transit. The retailer should not be penalized if such a situation has occurred. Although the proposed rule adopts a portion of this approach, we believe that the final rule should go even further. Rather than totally relying on enforcement discretion as suggested in the Department's preamble to the proposed rule, FFVA suggests that Sec 60.300 (d) be amended to insert the words "that a substantial amount of" after the word "provided."

3. USDA has adequately addressed labeling requirements for mixed or blended produce.

The guidelines required that blended products, such as bagged salad, list each commodity component by country and predominance of weight, value or other measurement. The law does

not require such detail. We suggested that a simple declaration of the country of origin of the combined components be sufficient. For blended products containing imported components, origin-labeling requirements should mirror the declarations mandated by the Tariff Act of 1930. FFVA believes that the Department has adequately responded to FFVA's request in Sec. 60.200 (h) Blended Products. The Department proposes that in the case of commingled or blended products of the same covered commodity from different origins, the countries of origin be listed alphabetically.

4. Sec. 60-400 should be amended by the Department to specify that no additional record keeping is required by COOL, and that there is no downstream liability for information provided by upstream suppliers.

The COOL statute states that the Secretary **may** (emphasis added) require the maintenance of a verifiable record-keeping audit trail. The requirements contained in the guidelines create a tremendous burden on the entire industry, and are unnecessary. Florida's country of origin labeling law has functioned well since 1979 without a mandated record-keeping system. Florida's law operates under the presumption of truthfulness of the information provided to the point of retail sale. However, in instances when false information is printed on the container, existing federal and state law provides remedies that adequately address those situations. The Department should take the same approach in developing regulations for COOL. There should be no downstream liability for the validity of information provided by a product supplier. FFVA suggested that if the Department elected to utilize its discretion under the statute and implement a record-keeping mandate, that it should be based on the current requirements of the PACA and The Tariff Act. Under PACA, retailers and suppliers are already required to maintain certain information and records associated with each produce transaction. This system is very familiar to all persons who operate responsibly in the buying and selling of produce.

In the proposed rule, the Department responded favorably to some of FFVA's suggestions, but we recommend that additional changes be made in the final rule. Sec. 60-400 should be amended to require no additional records beyond those already mandated by the Tariff Act of 1930, the Perishable Agricultural Commodities Act (PACA), and the FDA. As to liability for information provided to a retailer by a supplier, Sec. 60-400 (c)(3) should be changed by deleting the following language: "if the retailer could not have been reasonably expected to have had knowledge of the violation from the information provided by the supplier." FFVA believes that such a condition is not necessary and places an unfair burden on the person within a covered retail store who places produce in the bins or the shelves. Similarly such language should be deleted from Sec.60-400 (b)(2) relating to an intermediary supplier.

5. FFVA supports all other provisions in the proposed rule that relate to fruits and vegetables.

   These include:

   a. the definition of a "Processed food item" in Section 60.121

   b. the definition of "Produced" in Section 60.122

c. the definition of a food "Produced in any country other than the United States" in Section 60.123 (d) fresh and frozen fruits and vegetables "grown outside the United States."

d. the definition of "Retailer" in Section 60.126 as covered only those licensed under the PACA.

e. the definition of "United States country of origin" in Section 60.130(e).

f. the method of notification in Section 60.200 (a)(b)(c)(e)(f)(h) and (i). This section describes the method of notification required by retailers.

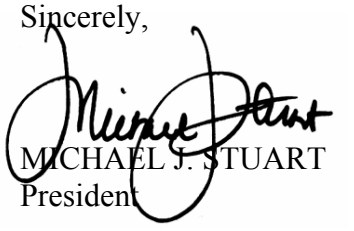
6. FFVA suggests that the Department issue enforcement guidelines for Section 253, the portion of the statute that would apply civil penalties for those other than retailers.

It would be highly improbable that a domestic grower would ever intentionally mislabel his commodity as to country of origin. However, it would be important for the grower and supplier to have the Department publish its enforcement guidelines for Sec. 253 similar to that published for Section 283 of the Statute, which applies to retailers. On Page 61952 of the proposed regulations, the Department discusses its intended enforcement policy. This should be expanded to cover enforcement policy for growers and suppliers.

FFVA believes that with these suggested changes to the proposed rule consumers can be provided with information regarding the origin of the produce they purchase at retail supermarkets with little additional regulatory burden on produce suppliers and retailers.

We greatly appreciate the efforts the Department has made to seek input from the industry on this issue. The suggestions made by our organization have been made by many others, as well. We are hopeful that the final regulations will be modified to reflect our suggestions, which we believe will result in a more flexible, common sense approach to origin labeling.

Sincerely,



MICHAEL J. STUART
President

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Desk Officer for Agriculture
Office of Information and Regulatory Affairs
Office of Management and Budget (OMB)
New Executive Office Building
725 17h Street, NW, Room 725
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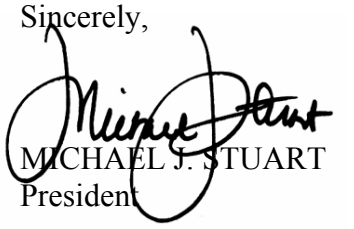

MICHAEL J. STUART
President